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# TRANSCRIPT OF RECORD

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Supreme Court of the United States

OCTOBER TERM, 1944

No. ~~684~~

26

ALLEN POPE, PETITIONER,

vs.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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PETITION FOR CERTIORARI FILED FEBRUARY 10, 1944.

CERTIORARI GRANTED APRIL 3, 1944.

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 684

ALLEN POPE, PETITIONER,

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ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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No. 45704

ALLEN POPE

v.

THE UNITED STATES

I. PETITION—Filed July 7, 1942

*To the Honorable the Court of Claims:*

The plaintiff, Allen Pope, respectfully represents:

I. Plaintiff is a citizen of the United States residing in the City of Washington, District of Columbia.

II. This suit is brought under and by virtue of an Act of Congress (Private Law No. 306—77th Congress) which reads as follows:

“AN ACT

“To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

“Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States, as described in [fol. 2] and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

“Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has

received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper 'B' or 'pay' line three inches, and to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into dry packing.

"Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

"Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United [fol. 3] States may be applied for by either party thereto, as is provided by law in other cases."

"Approved, February 27, 1942."

III. The case referred to in Section 3 was an action known as *Allen Pope v. The United States*, No. K-366, the findings of fact and opinion in which are reported in 76 C. Cls. 436, and the printed record therein is to be found in Court of Claims, "Printed Records," Vol. 642, the original record of evidence being thought now filed in the National Archives, Department of Justice Division, Court of Claims Section. Plaintiff asks that the said decision (K-366) of March 7, 1932, comprising the Special Findings of Fact, the copy of the contract, which by reference therein is made a part of Finding II thereof, and copy of the Opin-



ion be made a part of the record in this case as Plaintiff's Exhibit "A."

IV. Section 2 of the act above quoted provides for consideration by the Court of four (4) items of claim, namely:

- (1) "for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer whereby the plans for the work were so changed as to lower the upper 'B' or 'pay' line three inches, and as to omit the timber lagging from the side walls of the tunnel."
- (2) "for the work of excavating materials which caved in over the tunnel arch";
- (3) "for filling such caved-in spaces with dry packing . . . ., as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based upon the volume of grout actually used,"
- (4) "for filling such caved-in spaces with . . . . grout, as directed by the contracting officer, . . . . the amount of grout to be as determined by the court's [fol. 4] previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing."

As to the rates of payment at which adjudication of the foregoing claims is to be made Section 2 likewise provides:

"The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims . . . ."

The contract, Exhibit "A," pp. 31, 32 thereof (Record K-366) provides the following unit rates of payment:

Item No. 1	For excavation	\$17 per cubic yard.
Item No. 3	For concrete	\$17 per cubic yard.
Item No. 4	For dry packing	\$3 per cubic yard of space filled.
Item No. 5	For grouting	\$3 per bag of cement used in grout pumped into place.

V. The facts which gave rise to the items of claim thus authorized are stated as follows:

(1) The contract required payment for excavation and concrete to a specified line shown on the contract drawings and known as the "B" line. The contracting officer, by written order, changed such "B" line from the position shown on the contract drawings to a position three (3) inches lower than as thus shown. This order resulted in the contractor not being paid for the excavation of caved-in or excavated material between the line originally shown and that directed by the change, or for 57 cubic yards, which yardage at the contract price of \$17 per cubic yard amounts to \$969.00.

The contracting officer likewise directed the omission of certain side wall lagging shown on the plans and necessary [fol. 5] to prevent cave-ins from the side walls. Because of such omissions, there were cave-ins of 287 cubic yards from the side walls which the contractor was obliged to and did excavate and which work would have been unnecessary except for such omission of lagging. At the contract rate of \$17 per cubic yard, \$4,879.00 is due for excavation of materials caved in from side walls.

Also in order to complete the tunnel as ordered, the contractor was obliged to and did fill the caved-in spaces on the sides with concrete. For such filling in, the contract fixed a price of \$17 per cubic yard, which was not paid. Payment for 287 cubic yards of concrete at the rate of \$17 per cubic yard, or \$4,879.00 is now claimed.

These statements are in accordance with the claim under Item XII in plaintiff's original petition in K-366; the same as found and reported by the Commissioner's Finding X; and in accordance with the facts as found by the Court, Finding XI, except for obvious arithmetical errors included in the latter (57 yards at \$17.00 amounts to \$969.00 instead of \$669.00; whence the total sum is \$10,727 instead of \$10,427.)

(2) The ground over the arch proved to be loose and unstable. As a consequence when excavated, it caved in throughout the tunnel.

Such conditions were not indicated in the contract. The plans depicted hard, solid rock standing in place when tunneled into. The estimated quantities of work were likewise predicated upon existence of similarly solid formations.

The contract provided for the use of timber supports to prevent cave-ins, and further stated that "The contractor will be allowed considerable latitude in the method of tim-[fol. 6] bering \* \* \*." Other provisions obligated the contractor under bond to provide for the safety and protection of the completed work, of the plant, materials and employees, which protection was to be afforded by the adequate use of timber. Specifications, Paragraphs 4, 9, 26, 30, 44, 45, 58 and 68.

The contracting officer ordered the placement of timber in manner and extent wholly insufficient to prevent cave-ins over the arch. He required the timbers to be placed in special manner, i. e., in sets devised for support of unit lengths of tunnel excavation. The sets consisted of supporting timbers placed arch-fashion transversely of the tunnel, and short heavy planks, termed lagging, resting thereon but placed longitudinally of the tunnel. In order to place such timber supports and lagging, it was first necessary to excavate a correspondingly complete unit section of tunnel to provide the space in which to set them. During the progress of such excavation and before the timbers could be erected, the loose ground, being unsupported, caved in.

Such cave-ins over the arch might have been avoided entirely by employment of flat-top type of timbering instead of an arch type. Use of flat-top type of timbering would have permitted spiling to have been driven longitudinally as the excavation for the roof proceeded bit by bit, a procedure impossible with the arch type construction. Thus the roof would have been supported at all times, and the materials below could have been safely removed thereafter and the supporting timbers erected and braced. On the basis of cost, the contracting officer denied the contractor his request to so timber the tunnel, and required him to proceed in accordance with the officer's own plans, preferring to allow cave-ins to occur and to have them refilled [fol. 7] with dry packing and grout.

In certain places where it was considered that the initial caved-in spaces would increase little, if any, if not threatened by enlargement of the excavation for the placement of timber, the particular ground being more stable, or having the appearance of stability, the timber supports were directed to be omitted. These latter untimbered sections of the tunnel have been termed "rock sections" whereas the former have been called "timbered sections." The con-

tracting officer directed that all caved-in materials from above the "B" line of the tunnel arch, both in the "rock" and the "timbered" sections to be excavated and the spaces created by the cave-ins to be filled with drypacking and grout.

The extent of the caved-in spaces is accurately determined from the coextensive volume of spaces drypacked and grouted. The total space drypacked is indicated herein-after, sub-paragraph (3), to have been 5,561 cubic yards. Of this yardage, 57 cubic yards are claimed for hereinabove, and 723 cubic yards have been allowed for in the Court's Finding X, leaving 4,781 cubic yards as the net caved-in yardage unpaid for, and of which the Government has had the use and benefit for these many years. At \$17.00 per cubic yard, this amounts ~~to~~ \$81,277.00, now claimed.

The entire tunnel could have been timbered in such manner as to prevent all cave-ins, but at an increased cost to the Government over the cost incurred by the method ordered by the contracting officer. The method followed was much more hazardous to the workmen and many accidents occurred on such account.

These yardages, namely, 5,561 cubic yards, 57 cubic yards, and 723 cubic yards are identical with those reported in the Commissioner's Findings IV, X and IX, respectively. Like [fol. 8] wise the quantities 57 cubic yards and 723 cubic yards are identical with those found in the Court's Finding XI and X, while the amount of dry-packed space, 5,561 cubic yards, is to be determined and is here computed by the method described in the Court's opinion, employing the Court's arithmetic, and based upon the number of bags of cement determined by the Court's previous Findings III and VI as having been actually used in the grout which was pumped into the drypacking.

(3) Parts of the tunnel extended through what were known as "rock sections" and others through "timbered sections." As already stated hereinabove, cave-ins over the tunnel arch occurred in both the rock and timbered sections resulting in more extensive cavities than had been anticipated. The contract contemplated that such cavities would be filled by the placement of dry-pack and grout, the former being stones of varying sizes packed in place, the voids or spaces between which stones would, in turn, be filled by pumping grout therein, grout being a liquid mix-

ture of sand, cement and water in specified proportions. The cavities thus filled were much more extensive than had been expected and although the contractor was directed and required to fill all such spaces, he was not paid, either for the dry pack or the grout, except within limited spaces determined by the contracting officer arbitrarily and without sanction of the contract.

The contracting officer did not measure the volume of dry pack actually placed, but determined by estimate the volume within the limits which he thus arbitrarily established for pay purposes. However, the exact number of bags of cement required to be used to make the grout employed to fill the voids in the dry pack is known, 22,923 bags. The contracting officer ascertained by test that the use of one bag of cement mixed in the required proportions referred to [fol. 9] sulted in 2.62 cubic feet of grout, and that the voids or spaces between the stones of the drypacking filled by such grout were 40 per cent of the total space packed. Whence, 22,923 bags multiplied by 2.62 cubic feet, divided by 40 per centum, and again by 27 cubic feet in one cubic yard fixes the total space drypacked as 5.561 cubic yards. Of the space so dry packed, the contractor was paid for 814.1 cubic yards, leaving a balance of 4,746.9 cubic yards of dry pack that was not paid for. The contract rate for dry pack was \$3.00 per cubic yard. At this rate the contractor was not paid \$14,240.70 for dry pack actually placed as directed; and this sum is now claimed as the unpaid balance due for the placement of such dry pack.

The facts as herein recited are substantially as claimed in Item V of the original petition in K-366, as found by the Commissioners, Finding IV, and substantially as found by the Court, Findings III, IV and VI.

(4) The contract provided a rate of \$3.00 per bag for cement used in grouting the dry packed spaces. In the "timbered sections" the contractor used by direction of the contracting officer a total of 13,891 bags of cement, of which he was paid for 4,132.3 bags, leaving a balance of 9,758.7 bags for which no payment was made. In the "rock sections" the contractor similarly used 9,032 bags, for which no payment whatever was made. The plaintiff thus furnished and used a total of 18,790.7 bags of cement for which no payment was made. Under the terms of the contract he was entitled to payment for the 18,790.7 bags



so used as directed at the rate of \$3.00 per bag, or \$56,362.10, for which sum claim is now made.

These facts are in accordance with Item IV of the plaintiff's original petition in K-366; likewise in accord with [fol. 10] those found by the Commissioner, Finding III, and the same as those found by the Court itself in Findings III and VI. The grout was all pumped as directed by the contracting officer into the dry packing over the tunnel arch, which packing likewise was placed as directed by the contracting officer. The United States had the use and benefit of all the dry pack and grout so placed and has not paid therefor to the extent and in the amounts hereinabove set forth.

VI. Summarized, the claims now asserted and not previously allowed are as follows:

1. Excavation and concrete not paid for:	
(a) Excavation caved-in materials unpaid for because of lowering "B" line 3 inches, 57 cubic yards at \$17.00	\$ 969.00
(b) Excavation caved-in materials side walls due to omission side wall lagging 287 cubic yards at \$17.00	4,879.00
(c) Filling side wall caved-in cavities with concrete, 287 cubic yards at \$17.00	4,879.00
2. Excavation of materials which caved in over the tunnel arch, 4,781 cubic yards at \$17.00	81,277.00
3. Filling caved-in spaces over tunnel arch with dry packing not otherwise paid for, 4,746.9 cubic yards at \$3.00	14,240.70
4. Filling dry packing in overhead caved-in spaces with grout not otherwise paid for, 18,790.7 bags of cement at \$3.00	56,372.10
• Total	\$162,616.80

[fols. 11-12] VII. No other action has been had on said claim in Congress or by any of the departments; no person other than the plaintiff is the owner thereof or interested therein; no assignment or transfer of this claim, or of any part thereof or interest therein, has been made; the plain-



tiff is justly entitled to the amount herein claimed from the United States, after allowing all just credits and offsets; the plaintiff has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted, or given encouragement to rebellion against the said Government. The plaintiff is a citizen of the United States. And the plaintiff claims \$162,616.80.

King & King, Attorneys for Plaintiff.

George R. Shields, of Counsel.

*Duly sworn to by Allen Pope. Jurat omitted in printing.*

[fol. 13]

EXHIBIT

IN THE COURT OF CLAIMS

No. K-366

ALLEN POPE

v.

THE UNITED STATES

II. Exhibit "A"

Form 19.

THESE ARTICLES OF AGREEMENT entered into this third day of December, nineteen hundred and twenty-four, between Major J. A. O'Connor, Corps of Engineers, United States Army, hereinafter designated as the contracting officer, representing the United States of America, of the first part, and Allen Pope, of Washington, in the District of Columbia, hereinafter designated as the contractor, of the second part, WITNESS, that the said parties do hereby covenant and agree, to and with each other, as follows:

Article 1. In conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said contractor shall furnish all the necessary labor, machinery, tools and appliances and do the following:

SECOND HIGH TUNNEL

Item No. 1.—Excavating shafts and tunnel, about eight thousand six hundred (8,600) cubic yards, at Seventeen dollars (\$17.00) per cubic yard.

Item No. 2—Timbering shafts and tunnel, about sixty thousand (60,000) feet B. M., at ten cents (\$.10) per foot B. M.

Item No. 3—Concrete in tunnel lining and other structures, about three thousand nine hundred and fifty (3,950) cubic yards, at Seventeen dollars (\$17.00) per cubic yard.

[fol. 14] Item No. 4—Dry packing in tunnel, about five hundred (500) cubic yards, at Three dollars (\$3.00) per cubic yard.

Item No. 5—Grouting in tunnel, about two thousand five hundred (2,500) bags of cement, at Three dollars (\$3.00) per bag.

Item No. 6—Back filling, about five hundred and fifty (550) cubic yards, at One dollar (\$1.00) per cubic yard.

Item No. 7—Steel for reinforcement, about three thousand nine hundred (3,900) pounds, at ten cents (\$.10) per pound.

Item No. 8—Steel expansion plates, about four hundred and fifty (450) pounds, at twenty cents (\$.20) per pound.

Item No. 9—Steel, miscellaneous, about six hundred (600) pounds, at fifteen cents (\$.15) per pound.

Item No. 10—Special castings, about four (4) short tons, at Two hundred dollars (\$200.00) per short ton.

Article 2. All materials furnished and work done under this contract shall be subject to a rigid inspection by an inspector appointed on the part of the United States, and such as do not conform to the specifications of this contract shall be rejected. The decision of the contracting officer as to quality and quantity shall be final.

Article 3. The contractor shall commence the undertaking covered by this contract as set forth in paragraph 15 of the attached specifications, and shall prosecute the work, perform the services, and furnish and deliver the materials at a rate sufficient, in the opinion of the contracting officer, to secure completion within the contract time, as set forth in the paragraph of the specifications above cited. Should the contractor fail to make such progress the contracting officer shall have power, after ten days' notice in writing to the contractor, to employ such additional plant or labor.

to purchase such materials, and to liquidate such obligations of the contractor, as the contracting officer may deem necessary to put the work in a proper state of advancement, or to insure the proper completion of the undertaking within the time specified; and any excess cost thereof, over [fol. 15] what the work, services, or materials would have cost at the contract rate or rates shall be a charge against any sums due or to become due to the contractor, or such excess cost may be recovered from the contractor and his surety or sureties. This provision, however, shall not be construed to affect the right of the United States to take the work out of the hands of the contractor, as provided in Article 4 hereof, and to secure completion of the undertaking by contract or otherwise, in accordance with law. The right is reserved to assume the capacity of the contractor's plant and force on the work, or the past rate of progress and other ascertainable indications of ability and intention to continue or proceed as required, as a measure of probable future progress.

Article 4. If the contractor shall delay or fail to commence with the delivery of the material or the performance of the work as specified herein, or shall, in the judgment of the contracting officer, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then, in either case, the contracting officer shall have power, with the prior sanction of the Chief of Engineers, to take the work out of the hands of the contractor by giving notice in writing to that effect to the contractor and his surety or sureties; and upon the giving of such notice all payments to the contractor under this contract shall cease, and all money or reserved percentage due or to become due thereunder shall be retained by the United States until the final completion and acceptance of the work herein stipulated to be done; and the contracting officer shall have the right to proceed forthwith to secure the delivery of the material, or the performance of the work, by contract or otherwise, in accordance with law, conforming as nearly as practicable in completing the contract to the requirements and conditions prescribed therein. Any departure from such requirements and conditions, however, shall not release the contractor or the surety or sureties of the contractor from their liability for the damages due to the contractor's default, but they shall not be responsible for any increased cost involved in such

departure. Whatever sums may be expended by the United States in completing the said contract in excess of the [fol. 16] price herein stipulated to be paid the contractor for completing the same, and also all costs of inspection and superintendence, including all necessary traveling expenses connected therewith, incurred by the United States in excess of those payable by the United States during the period herein allowed for the completion of the contract by the contractor, shall be charged to the contractor, and the United States shall have the right to deduct such excess cost out of or from any money or reserved percentage retained, as aforesaid, or to recover the same, or any part thereof, from the contractor and his surety or sureties.

Article 5. If the contractor shall fail to deliver the material or to prosecute the work covered by this contract so as to complete the same within the time agreed upon, then, in lieu of taking the work out of the hands of the contractor as provided in Article 4 of this agreement, the contracting officer, with the prior sanction of the Chief of Engineers, may waive the time limit and permit the contractor to finish the work within a reasonable period, to be determined by the contracting officer. Should the time limit be thus waived, all expenses for inspection and superintendence after the date fixed for completion, including all necessary traveling expenses connected therewith, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion, shall be determined by the contracting officer and deducted from any payments due or to become due the contractor: *Provided, however,* That no charge for inspection and superintendence shall be made for such period after the date fixed for completion of this contract, as, in the judgment of the contracting officer, approved by the Chief of Engineers, shall equal the time which shall have been lost through any cause for which the United States is responsible, either in the beginning or prosecution of the work, or in the performance of extra work ordered by the contracting officer, or on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by strikes, epidemics, local or State quarantine restrictions, or other unforeseeable cause of delay arising through no fault of the contractor, and which actually prevented such contractor from delivering the material or commencing or completing the work within the period required by the contract.

[fol. 17] The findings of the contracting officer, approved by the Chief of Engineers, shall be accepted by the parties hereto as final. But such waiver of the time limit and remission of charges shall in no other manner affect the rights or obligations of the parties under this contract, nor be construed to prevent action under Article 4 hereof in case the contractor shall fail, in the judgment of the contracting officer, to make reasonable and satisfactory progress after such waiver of the time limit.

Article 6. If, at any time during the life of this contract, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve a material change in the character or quantity of labor or material to be furnished, or in any other provision of the contract, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor, or the other provisions thus substituted for those named in the original contract, and before taking effect must be approved by the Secretary of War: *Provided*, That no payments shall be made in accordance with such supplemental or modified agreement unless the same was signed and approved before the obligation arising from such modification was incurred.

Article 7. No claim whatever shall at any time be made upon the United States by the contractor for or on account of any extra work or material performed or furnished, or alleged to have been performed or furnished under or by virtue of this contract, and not expressly bargained for and specifically included therein, unless such extra work or materials shall have been expressly required in writing by the contracting officer, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers. Minor reductions in quantities, or omission of items, may likewise be made under this article by agreement in writing and prior approval of the Chief of Engineers.

Article 8. The contractor shall be responsible for and pay all liabilities incurred for labor and material in the prosecution of the work.

[fol. 18] Article 9. Until final inspection and acceptance of, and payment for, all of the material and work herein



provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the contracting officer to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

Article 10. The contractor will hold and save the United States, its representatives, and all other persons acting for it as agent, contractor, or otherwise, harmless from all demands or liabilities for alleged use of any patented or unpatented invention, secret process, or suggestion in, or in the making or supplying of the articles of work herein contracted for, and for alleged use of any patented invention in using such articles or work for the purpose for which they are made or supplied, and if and when required, will discharge and secure the United States from all demand or liability on account thereof by proper release from the patentees or claimants, but if such release is not practicable, then by bond or otherwise, and to the satisfaction of the Chief of Engineers.

Article 11. Payments shall be made to the contractor as prescribed in Article 1 of this agreement, and in paragraph 17 of the attached specifications.

Article 12. Neither this contract nor any interest therein shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferrer or the transferee, but all rights of action for any breach of this contract by the contractor are reserved to the United States.

Article 13. No Member of or Delegate to Congress, or Resident Commissioner, nor any person belonging to or employed in the military service of the United States, is, or shall be, admitted to any share or part of this contract, or to any benefit which may arise herefrom; but, under the provisions of Section 116 of the act of Congress approved March 4, 1909 (35 Stats., 1109), this stipulation, so far as it relates to Members of or Delegates to Congress or Resident Commissioners, shall not extend, or be construed to extend, to any contract made with an incorporated company for its general benefit.

[fol. 19] Article 14. In the performance of this contract, the contractor shall not, directly or indirectly, employ any minors under the age of sixteen years, nor any persons undergoing sentences of imprisonment at hard labor which



have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction.

\* Article 15. In so far as the Act of August 1, 1892, or the Act of March 3, 1913, applies, no laborer or mechanic employed by the contractor or by any subcontractor on the work herein specified, and no person employed to perform services similar to those of laborers and mechanics while directly operating dredging ~~or rock~~-excavating machinery or tools on the work herein specified, shall be permitted or required to work more than eight hours in any one calendar day except in case of extraordinary emergency.

Article 16. Subject to the conditions enumerated in section 2 of the eight-hour law of June 19, 1912, no laborer or mechanic doing any part of the work contemplated by this contract, in the employ of the contractor or any subcontractor contracting for any part of said work contemplated, shall be required or permitted to work more than eight hours in any one calendar day upon such work. For each violation of this provision a penalty of five dollars shall be imposed for each laborer or mechanic for every calendar day in which he shall be required or permitted to labor more than eight hours upon said work, and the amount of any such penalties shall be withheld for the use and benefit of the United States from any moneys becoming due under this contract, whether the violation of this provision is by the contractor or any subcontractor.

Article 17. The term "contracting officer," wherever used in this contract, shall include the duly appointed successor of such officer.

Article 18. The contractor expressly warrants that he has employed no third person to solicit or obtain this contract in his behalf, or to cause or procure the same to be obtained upon compensation in any way contingent, in whole or in part, upon such procurement; and that he has not paid or [fol. 20] promised or agreed to pay, to any third person, in consideration of such procurement, or in compensation for services in connection therewith, any brokerage, commis-

\* Cancel this Article in any contract to which the Act of August 1, 1892, or the Act of March 3, 1913, does not apply.

+ Cancel this Article in any contract to which the Act of June 19, 1912, does not apply.

sion, or percentage upon the amount receivable by him hereunder; and that he has not, in estimating the contract price demanded by him, included any sum by reason of any such brokerage, commission, or percentage; and that all moneys payable to him hereunder are free from obligation to any other person for services rendered or supposed to have been rendered, in the procurement of this contract. He further agrees that any breach of this warranty shall constitute adequate cause for the annulment of this contract by the United States, and that the United States may retain to its own use from any sums due or to become due thereunder an amount equal to any brokerage, commission, or percentage so paid or agreed to be paid: *Provided, however*, It is understood that this covenant does not apply to the selling of goods through a bona fide commercial representative employed by the contractor in the regular course of his business in dealing with customers other than the Government and whose compensation is paid, in whole or in part, by commissions on sales made, nor to the selling of goods through established commercial or selling agents or agencies regularly engaged in selling such goods.

‡ Article 19. This contract shall be subject to the approval of the Chief of Engineers, U. S. Army; and such approval, when given, shall relate back to, and be operative from, the date of the execution of the contract.

In Witness Whereof the parties aforesaid have hereunto placed their signatures the date first hereinbefore written. Article — having been canceled with our knowledge and consent, such elimination being hereby agreed to.

Witnesses: S. L. Duryee, as to J. A. O'Connor, Major, Corps of Engineers, U. S. Army; R. B. Cummings, as to Allen Pope; — — —, as to — — —.

[fol. 21] (Executed in Triplicate)

Approved: December 18, 1924.

Edgar Jadwin, Brig. Gen., Corps of Engineers, Acting Chief of Engineers, U. S. Army.

‡ Cancel this Article in all emergency contracts.

I certify that all of the terms of this contract are within the requirements of The Act of Congress approved June 7, 1924, and the revised estimates.

Edgar Jadwin, Brig. Gen., Corps of Engineers, Acting Chief of Engineers.

— or any other person; and that the papers accompanying include all those relating to the said contract as required by the statute in such case made and provided.

—, Corps of Engineers.

Subscribed and sworn to before me this — day of —, 192—. —, —.

I certify that the award of the foregoing contract was made to the lowest responsible bidder for the best and most suitable articles and service, on proposals received in response to advertisement hereto attached, which was published for — days by —, and that further advertisement was impracticable.

—, Contracting Officer.

NOTE.—The copy of contract for the Bureau must be accompanied with an abstract of the bids, and one copy (original) of each bid and advertisement, unless previously furnished.—A. R. 549.

NOTE.—The name of the principal intended to be bound as party of the second part, whether an individual, a partnership, or a corporation, should be inserted in and signed to the contract. An officer of a corporation, a partner, or an agent signing for the principal should add his name and designation after the word "by" and under the name of the principal; and an agent of the principal or an officer, if the principal be a corporation, should file evidence of his authority.

Certificate to be given by the contracting officer on the copies of the contract for the Chief of Engineers, and the General Accounting Office, Military Division.

"Insert "newspaper" or "poster and circular letter," etc., as the case may be.

This affidavit is required only on the copy of contract intended for the Returns Office, Department of the Interior.

—A. R. 563.

Form 19. War Department. Engineers. Authorized April 30, 1896. With amendments to Nov. 17, 1923. 3760 D. C. Water Supply 9/3.

Articles of Agreement. Entered into Dec. 3, 1924, between Major J. A. O'Connor, Corps of Engineers, of the first part, and Allen Pope, of Washington, D. C., of the second part, for construction of Second High Tunnel. Office, Washington, D. C., U. S. Engineers, Dec. 19, 1924.

[fol. 23]

## War Department

### Increasing Water Supply, District of Columbia

#### Advertisement

United States Engineer Office,  
250 Old Land Office Building, Washington, D. C.

Sealed proposals will be received here until 12 M., November 4, 1924, and then opened, for the construction of the tunnel for the 2nd high service of the water supply for the District of Columbia. Further information on application.

#### General Specifications

1. *Guaranty.*—No proposal will be considered unless accompanied by a guaranty, which should be in manner and form as directed. At the option of bidders certified checks for the amount of the guaranty required may be furnished in place of the guaranty.

2. *Bids In Duplicate.*—All bids and guaranties must be made in duplicate upon printed forms to be obtained at this office.

3. *Liability of Guarantors.*—Each individual guarantor will justify in the sum equal to 20 per centum of the proposal which his guaranty accompanies. The liability of the guarantors and bidder is determined by the act of March 3, 1883, 22 Stat., 487, Chap. 120, and is expressed in the guaranty attached to the bid.

4. *Contract and Bond.*—The bidder to whom award is made will be required to enter into written contract with the United States, with good and approved bond, in an amount approximately equal to and not less than 50 per centum of

the estimated amount of the contract, within 10 days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, [fol. 24] blank forms of which may be inspected at this office, and will be furnished, if requested, to parties proposing to submit bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract. The right is reserved to reject any or all bids, and to waive any informalities in the bids received.

5. *Address.*—The proposals and guaranties must be placed in a sealed envelope marked "Proposal for Tunnel Construction, to be opened November 4, 1924," and inclosed in another sealed envelope addressed to The District Engineer, 250 Old Land Office Building, Washington, D. C., but otherwise unmarked. (Note.—It is suggested that the inner envelope be sealed with sealing wax.)

6. *Definition of Terms.*—Whenever the term "contracting officer" is used in the specification it is understood to refer to the District Engineer in charge of the work. He will be represented on the work by as many assistants as may be necessary. Whenever the term "contractor" is used it is understood to refer to the second party to the contract. Subcontractors, as such, will not be recognized.

7. *Quantities Approximate.*—It is understood and agreed that the quantities given in these specifications are approximate only, and that no claim shall be made against the United States on account of any excess or deficiency, absolute or relative, in the same. No allowance will be made for the failure of a bidder or of the contractor to estimate correctly the difficulties attending the execution of the work.

8. *Errors and Omissions.*—The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

9. *Contractor's Responsibility.*—It is understood and agreed that the contractor assumes full responsibility for the safety of his employees, plant, and materials, and for



any damage or injury done by or to them from any source or cause.

[fol. 25] 10. *Convict Labor*.—In the prosecution of the work herein specified, the employment of persons undergoing sentences of imprisonment at hard labor which have been imposed by courts of the several States, Territories, or municipalities having criminal jurisdiction is prohibited.

11. *Objectionable Employees*.—The contractor will be required to discharge any employee who, in the opinion of the contracting officer, is objectionable or incompetent. This requirement shall not be made the basis of any claim for compensation or damages against the United States or any of its officers or agents.

12. *Contractor To Be Present or Represented*.—The contractor must at all times either be personally present upon the work or be represented thereon by a responsible agent, to be designated in writing by the contractor, who shall be clothed with full authority to act for him in all cases, and to carry out any instructions relative to the work which may be given by the contracting officer, either personally or through an authorized representative.

13. *Sundays, Holidays, and Nights*.—No work shall be done on Sundays or on days declared by Congress as holidays for per diem employees of the United States except in cases of emergency, and then only with the written consent of the contracting officer; nor shall any work be done at night unless authorized in writing by the contracting officer.

14. *Eight-Hour Laws*.—The attention of bidders is called to the Acts of Congress approved August 1, 1892, June 19, 1912, and March 3, 1913, limiting the hours of daily service of certain classes of persons defined in the acts, upon work covered by contracts with the United States. Copies of these acts may be obtained at this office. All bidders are advised that the provisions and stipulations of such of these acts as apply to the work covered by these specifications will be considered as included in any contract entered into under these specifications, and that violations of the Act of August 1, 1892, or the Act of March 3, 1913, will be reported by the officers of the War Department for such action as the Department of Justice may deem it proper to take, and [fol. 26] violations of the Act of June 19, 1912, will be re-



ported by any officer or person designated as inspector of the work to be performed under these specifications, to the proper officer, as directed in the act.

15. *Commencement, Prosecution, and Completion.*—The contractor will be required to commence work under the contract within 30 days after the date of receipt of notification of approval of the contract by the Chief of Engineers, U. S. Army, to prosecute the said work with faithfulness and energy, and to complete it within 24 months after said date of receipt of notification.

16. *Sufficiency of Time.*—The time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such completion by a contractor having the necessary plant, capital, and experience, unless extraordinary and unforeseeable conditions arise.

If, at any time after the date fixed for beginning work, it shall be found that operations are not being carried on at the prescribed rate or at a rate sufficient, in the opinion of the contracting officer, to secure completion within the contract time, the contracting officer shall have the power, after 10 days' notice in writing to the contractor, to put on such additional labor or plant, or to purchase such materials as may be necessary to put the work in a proper state of advancement, and any actual final excess cost thereof to the United States over what the work would have cost at the contract rate, after crediting the contractor with the value to the United States (as determined by the contracting officer) of the remaining plant and unused materials so purchased, will be deducted from any sums due or to become due the contractor. The right is reserved to the United States to assume the capacity of the plant and force actually on the work at any time as a measure of probable progress thereafter.

The provisions of this paragraph, however, shall not be construed to affect the right of the United States to take the work out of the hands of the contractor, as provided for in the contract form; nor shall any failure of the contracting officer to take action under this paragraph or to take the [fol. 27] work out of the hands of the contractor, in case the contractor fails to make a satisfactory rate of progress during any month or any series of consecutive months, be construed as a waiver of the right of the United States to require the contractor to make good the deficiency in future

months, or to take further action under this paragraph, or to later take the work out of the hands of the contractor if the deficiency is not made up within a reasonable time.

17. *Payments.*—The District of Columbia appropriation act approved June 7, 1924, contains the following provisions:

“For continuing work on the project for an increased water supply for the District of Columbia, adopted by Congress in the Army appropriation Act for the fiscal year 1922, as modified by the District of Columbia appropriation Acts for the fiscal years 1923 and 1924, and as further modified by the report submitted to Congress by the Secretary of War December 4, 1923, and for each and every purpose connected therewith, to be immediately available and to remain available until expended, \$1,500,000: *Provided*, That the Secretary of War may enter into contracts for materials and work necessary to the construction of said project, to be paid for as appropriations may from time to time be made, not to exceed in the aggregate the sum of \$8,900,000, including all appropriations and contract authorizations herein and heretofore made: *Provided further*, That no bid in excess of the estimated cost for that portion of the work or plant covered by the bid shall be accepted, nor shall any contract for any portion of the work, material, or equipment to constitute a part of the plant for which this appropriation is available be valid unless the Chief of Engineers of the United States Army shall have certified thereon and that all its terms are within the requirements of the authorization and the revised estimates for the work.”

Of these amounts the sum of \$100,000 of the funds appropriated and the balance from contract authorization will be allotted and reserved for payments for the work herein specified, including all costs of superintendence and inspection [fol. 28] and other collateral and incidental expenses connected therewith. It is expected that Congress, in accordance with the provisions of the act quoted in this paragraph, will make additional appropriations before available funds are exhausted, but as to this it must be distinctly understood and agreed that the United States is in no case to be made liable for damages in connection with this con-

tract on account of delay in payments on same due to a lack of available funds. Should it become apparent that the available funds will be exhausted before the completion of the contract, the contracting officer will give 30 days' written notice to the contractor that work may be suspended; but, if the contractor so elects, he may continue work under the conditions and restrictions of the specifications, after the time set by such notice, so long as there are funds for inspection and superintendence, with the understanding, however, that no payment will be made for such work until additional funds shall have been provided in sufficient amount. When funds again become available, the contractor will be notified accordingly. Should work be thus suspended, additional time for completion will be allowed equal to the period during which work is necessarily so suspended, as determined by the dates specified in the above notices. (See par. 15.)

So long as funds are available, payments will be made monthly on estimates of work done in accordance with the specifications and not included in any prior estimate, except that 10 per centum of the amount of each estimate will be retained until the contract work is 50 per centum completed, and thereafter with each monthly payment there will be paid such portion of the amount so retained as is in excess of 10 per centum of the estimated cost of completing the work remaining to be done, until the amount retained is reduced to \$16,000, after which the amount retained will remain unchanged until the full completion of the contract. Should payment be discontinued owing to exhaustion of available funds, all but \$16,000 of the total amount retained will be paid to the contractor.

The procedure above described will be repeated as often as may be necessary on account of the exhaustion of available funds and the necessity of awaiting the appropriation of additional funds by Congress.

Should Congress fail to provide additional funds during its regular session as expected, the contract may be terminated and considered to be completed, at the option of the contractor, without prejudice to him, at any time not later than 30 days after payments are discontinued, or if payments have been previously discontinued, not later than 30 days after the passage of the act which would ordinarily carry an appropriation for continuing the work, or after the adjournment of Congress without passing such act.

18. *Bidder's Ability.*—Each bidder shall submit with his proposal a statement setting forth what experience he has had in the prosecution of construction work of a magnitude comparable to that covered by these specifications. Award will be made only to the bidder who can demonstrate beyond question that he has had the experience and ability to prosecute the work to completion within the time specified and in no case will the contract hereinafter described be awarded to a bidder unless he can show to the satisfaction of the contracting officer that he has the organization and equipment necessary to complete the contract within the time specified.

### Detailed Specifications

19. *Location.*—The work is located in the District of Columbia and extends along the line of Upton Street between 37th and 44th Streets, northwest.

20. *Work Required.*—The work required consists of furnishing all necessary materials, labor, plant, tools, machines, and appliances and constructing a tunnel about 6 feet in diameter and about 3,600 feet in length with shafts, inlet and outlet structures and concrete lining complete, as described in these specifications and shown on the drawings referred to in Paragraph 29, with such minor modifications, if any, as may be required by the contracting officer under the provisions of Paragraph 30.

The work on the tunnel is divided into 10 items and the approximate quantities in the various items are as follows:

Item No. 1—Excavating shafts and tunnel	8,600 cubic yards
“ “ 2—Timbering shafts and tunnel	60,000 feet B. M.
“ “ 3—Concrete in tunnel lining and other structures	3,950 cubic yards
“ “ 4—Dry packing in tunnel	500 “
“ “ 5—Cement in grout	2,500 bags
“ “ 6—Back filling	550 cubic yards
“ “ 7—Steel for reinforcement	3,900 pounds
“ “ 8—Steel expansion plates	450 “
“ “ 9—Steel, miscellaneous	600 “
“ “ 10—Special castings	4 short tons

21. *Order of Work.*—The work may be carried on in such order as the contractor may deem most advantageous, provided that it is approved by the contracting officer.

22. *Geological Formation.*—Borings have been taken on the site of the work, and the geological formation, as indicated by these borings, is shown on Sheet No. 1 of the drawings described in Paragraph 29.

Bidders will have access to all data that has been collected by the contracting officer regarding the geological formation on the site of the work. They are expected to determine for themselves the nature of the formation, to check the data collected by the contracting officer and to assure themselves regarding the formation through which their work will be carried, and any discrepancies between the nature of the formation as it actually exists and as indicated by the data given by the contracting officer will not be recognized as valid grounds for any claim against the United States for compensation over and above the prices named in their bids.

23. *Transportation Facilities.*—Materials for constructing the tunnel may be hauled to the site of the work on either Massachusetts and Nebraska Avenues or Wisconsin Avenue and Pierce Mill Road.

24. *Land To Be Occupied.*—The United States owns the subterranean right of way only for the construction and [fol. 34] maintenance of the tunnel. It owns no surface rights with the exception of a narrow strip for pipe lines. The contractor will, therefore, be required to provide, at his own expense, such land as he may require for his plant, equipment and for the final disposal of materials excavated from the tunnel.

25. *Plant and Organization Required.*—The purpose of this contract is to effect the construction of the works described in these specifications in the shortest reasonable time consistent with good construction. To this end the contractor will be required to use improved methods and appliances for doing the various parts of the work. A complete and suitable construction plant must be used and an effective organization must be maintained. The contractor shall submit to the contracting officer plans showing his proposed layout of plant and transportation facilities and a



complete schedule of equipment, including the apparatus for measuring fine and coarse aggregates and water for concrete. No plant shall be installed by the contractor and no work done on the contract prior to the approval by the contracting officer of the contractor's layout plans and equipment schedule.

26. *Responsibility of Contractor for Plant and Methods.*

—The contractor shall provide and install such construction plant and shall use such methods, appliances and organization for the performance of all operations connected with the work to be done under the contract as will insure a satisfactory quality of work and a rate of progress which, in the opinion of the contracting officer, will insure the completion of the work within the time specified. If at any time before the commencement or during the progress of the work such methods or appliances appear to the contracting officer to be unsafe, inefficient or inadequate for securing the safety of the workmen, the quality of the work or the rate of progress required, he may order the contractor to increase their safety and capacity or to improve their character, and the contractor shall comply with these orders. Failure of the contracting officer to make such demand shall not release the contractor from his obligation to secure the safe conduct, the quality of the work, and the rate of progress required by the contract.

[Eol. 32] The contractor shall at all times be responsible for conducting his work in such a manner as to insure the safety of all structures. If at any time any Federal structures, whether previously constructed or being constructed under this contract, or constructed otherwise, are injured or rendered unsafe for use by the operations of the contractor, he shall at his own expense immediately and thoroughly repair all damages to the satisfaction of the contracting officer.

The contracting officer reserves the right to limit the use of explosives, or to order the discontinuance of the use of any method of operation which, in his opinion, endangers any part of the existing structures, and no claim for additional compensation by the contractor, on account of such orders, will be considered.

The contractor shall also be responsible for any damage to existing structures or property outside the property lines of the United States that may be caused by his operations.



27. *Repairs To Plant.*—The contractor shall at all times maintain on the site of the work a suitable repair shop and equipment for the purpose of making adjustments and repairs to machinery and for the general maintenance work required in keeping the construction plant up to its normal efficiency, and shall have on hand, at all times, duplicate parts of such machinery as are especially liable to wear rapidly, break or be lost.

28. *Field Office.*—The contractor shall, during the continuance of his contract, provide and maintain on the site of the work a suitable office for his own use furnished with office equipment and telephone, and shall keep a full set of drawings and specifications in said office for reference.

29. *Drawings.*—The work shall conform to drawings entitled "Increase of Water Supply for the District of Columbia, Second High Tunnel," which form a part of these specifications and are filed in the United State Engineer-Office, Old Land Office Building, Washington, D. C. They consist of 2 sheets, namely, Sheet No. 1, entitled "General Plan and Profile," and Sheet No. 2, "Typical Sections & End Structures," and bear the signature of the contracting officer dated August 11, 1924. These plans show the general character of the work and are intended to supplement the specifications in such a manner as to make them explanatory to each other, but should any discrepancy appear, or any misunderstanding arise as to the import of anything contained in either, the explanation of the contracting officer shall be final and binding on the contractor.

Such detail drawings as the contracting officer may consider necessary to amplify and explain the contract drawings will be furnished by him. Figures shown on drawings shall in all cases take precedence over scale measurements.

All drawings and specifications are the property of the contracting officer. Prospective bidders will be furnished copies of drawings upon the deposit with the contracting officer of cash or certified check to the amount of \$3.00, which will be forfeited in case of failure to return all drawings on or before January 30, 1925. The contractor will be furnished, free of cost, 6 complete sets of the contract drawings and 4 copies of any supplementary drawings that may be issued.

Should it become necessary that the contractor submit drawings for the approval of the contracting officer in con-

nection with the work to be done under these specifications, they shall be furnished to the contracting officer in tracing form and free of charge.

Any corrections of errors or omissions in the drawings and specifications may be made by the contracting officer when such correction is necessary for the proper fulfillment of their intention as construed by him, and his decision in such cases shall be final and binding. The contractor shall check all dimensions and quantities on the drawings or schedules given him by the contracting officer, and he will not be allowed to take advantage of any error or omission in the specifications or drawings, but shall accept the decision of the contracting officer as to the intent of the drawings and specifications.

30. *Minor Modifications.*—The contracting officer reserves the right to make any additions to, omissions from or alterations in the work as described in these specifications [fol. 34] and shown on the drawings referred to in Paragraph 29, whenever he shall deem such additions, omissions or alterations necessary or desirable, provided that the sum total of all such additions to or subtractions from the contract plans amounts to less than 10 per centum of the total amount of the contract price.

All changes will be ordered by the contracting officer in writing, and the value of any additions, omissions or alterations so ordered will be added to or deducted from the contract price. Such value will be determined and fixed by the contracting officer on the basis of the unit price bid under the contract. The contractor shall have no claim for damages or for anticipated profit on account of any additions, omissions or alterations ordered as above provided, and such additions, omissions and alterations shall in no way vitiate this contract.

31. *Extra Work.*—Extra work under this heading shall be understood to mean all work other than that which is itemized in these specifications. The contractor shall do such extra work as may be ordered in writing by the contracting officer, and no claim for extra work will be considered or allowed unless the said work has been approved and ordered in writing by the contracting officer.

At the option of the contracting officer, the price of such extra work may be agreed upon in advance of the execution of the same, or it may be done on the basis of actual cost to

the contractor plus a commission of fifteen per centum to cover supervision and use of tools.

The actual cost of extra work above specified shall include only the cost to the contractor of necessary labor and materials employed on or incorporated into the work, together with the cost of insurance of employees and the public, where such insurance is carried, and such allowance for the use of any machinery actively employed on the work as may be determined by the contracting officer, but such actual cost shall not include the use of tools, general superintendence, office accounting, engineering expenses, allowances or percentages for collateral or estimated costs, or any profit, all of which shall be deemed to be and shall be [fol. 35] included in and covered by the above specified allowance of 15 per centum.

All such extra work shall be done as economically as possible, and materials and supplies used in such work shall be charged at the lowest market price prevailing at the nearest general supply point at the time of the work. The contracting officer may at his own discretion furnish any materials or supplies required for extra work, and the contractor shall not be entitled to any allowance or percentage on account of materials and supplies so furnished.

At the close of each day on which extra work performed on the actual cost basis shall have been done by the contractor, reports shall be made out in triplicate on forms to be furnished for that purpose by the contracting officer, showing in detail the cost and character of extra work performed on that day; these reports shall be approved by the contracting officer and by the contractor or his proper agent, and one copy shall be retained by the contractor. No work will be paid for as extra work upon which a unit price has been bid under this contract.

32. *Lines and Grades.*—All lines and grades will be given by the contracting officer or his representatives, but the contractor shall provide such material and give such assistance as may be required, and shall carefully preserve the marks. The contractor shall keep the contracting officer informed a reasonable time in advance as to times and places in which he intends to do work in order that lines and grades may be furnished and necessary measurements for record and payments may be made with a minimum inconvenience to the contracting officer and the contractor.

33. *Reference Lines for Tunnel and End Structures.*—The reference lines designated as "A," "B" and "C" lines on the drawings showing the cross sections of the tunnel have the following significance: The "A" line is that within which no unexcavated material of any kind and no timbering will be permitted to remain. It is, therefore, the outer line of minimum thickness of masonry lining in any portion of the tunnel.

[fol. 36] The "B" line defines the outer limits of excavation and lining to be paid for regardless of the amount of material removed outside of that line.

The "C" line is the outer line of effective average thickness of masonry lining. No rock or other foreign materials will be permitted to remain within the "C" line except under such circumstances that the strength of the lining against external pressure, considered in lengths not exceeding 4 feet, is not thereby reduced. Payment lines for the end structures will be vertical lines 2 feet outside of the limits of the base of the masonry.

34. *Supervision.*—The work will be carried on under the general direction and supervision of the contracting officer who will employ inspectors for the work. The inspectors will keep a record of the work done and see that all necessary stakes for marking lines and grades are maintained in their proper position. They shall have power to enforce strict compliance with the terms of the specifications, and to reject any work or material that does not conform to the requirements of the specifications.

The contractor shall furnish, without charge, all necessary assistance, appliances, samples of materials and test specimens including concrete for test cylinders as may be ordered by the contracting officer or by his representatives for the purpose of making official tests and investigations. He shall furnish the contracting officer with every reasonable facility for ascertaining whether the work is in accordance with the requirements and intention of the contract, even to the extent of uncovering or taking down a portion of finished work. Should the work thus exposed, or examined prove satisfactory, the uncovering or removal and replacing will be paid for at the contract price for the work done. Should the work examined or exposed prove unsatisfactory, the uncovering, removal and replacing shall be done at the expense of the contractor.

The contractor shall notify the contracting officer of the time and place of preparation, manufacture or construction of all material for or part of the work which he may wish to [fol. 37] inspect before delivery at the site of the work. Such notification shall be given sufficient time in advance of the beginning of the work on such material or part to allow arrangements to be made for inspecting and testing.

35. *Access to the Work.*—The contractor shall permit the contracting officer and his representatives to enter upon the work and the premises used by the contractor at any time, and shall provide proper and safe facilities by means of ladders or otherwise for convenient access to all parts of the work the said officer or his representatives may wish to inspect.

36. *Materials To Be Satisfactory.*—All materials furnished for carrying out the contract shall be of the best quality and of the character required by the specifications. Where no standard is specified for such materials they shall be the best of their respective kind. The contractor shall, at his expense, immediately remove any unsatisfactory materials whenever discovered and shall replace them to the satisfaction of the contracting officer whenever notified by the latter to do so.

If the contractor shall neglect or refuse to remove such unsatisfactory material within 48 hours after the service of the above mentioned notice, or if he shall not make satisfactory progress in doing so, then the contracting officer may remove said material or cause the same to be removed and satisfactorily replaced by contract or otherwise as he may consider expedient. The expense thereof will be charged to the contractor, and such expense so charged will be deducted from the amount due or to become due him under the contract.

37. *Defective Work.*—Neither the inspection nor supervision of the work, nor the presence of any employees of the contracting officer during the execution of any work shall relieve the contractor of any of his obligations to fulfill his contract or to perform his work to the lines, grades, etc., given by the contracting officer or his representatives. Defective work shall be made good notwithstanding that such work may have been previously overlooked by the contracting officer or his representatives and accepted and paid for.



[fol. 38] If the work or any part thereof shall be found defective at any time before the final acceptance of the whole work, the contractor shall forthwith make good such defect in a manner satisfactory to the contracting officer.

38. *Contracting Officer To Be Referee.*—To prevent disputes and litigation, the contracting officer shall in all cases determine the amount, quality and acceptability of the work and supplies which are to be paid for under the contract; shall determine all questions in relation to the work and supplies; and shall in all cases decide every question relative to the fulfillment of the terms and provisions of the contract. His decision and estimates shall be final. He shall also make all necessary explanations as to the meaning and intention of the specifications, and shall give all orders and directions necessary to cover cases in which difficult or unforeseen conditions may arise during the performance of the work.

39. *Claims for Damages.*—If the contractor shall claim compensation for any damage sustained by reason of the act of the contracting officer or his representatives, he shall, within 5 days after the alleged sustaining of such damage, make a written statement thereof to the contracting officer. On or before the 15th day of the month subsequent to that in which any such alleged damage shall have been sustained, the contractor shall file with the contracting officer an itemized statement of the details and amount of such damage, and unless such statement shall be made his claim for compensation shall be forfeited and invalidated, and he shall not be entitled to payment on account of any such alleged damage.

40. *Indemnifications of the United States.*—The contractor will hold and save the United States harmless from all suits, actions, damages or costs of every name and description to which the United States may be subjected or put by reason of injury to persons or damage to property resulting from negligence or carelessness on the part of the contractor, his employees or agents in the delivery of materials and supplies, or on account of any act or omission of the contractor, his employees or agents in the execution of the work, and the whole or so much of the moneys due or to become due the contractor under the contract, as may be considered necessary by the contracting officer, may be

[fol. 39]

retained by him until such suits or claims for damages have been settled or otherwise disposed of and satisfactory evidence to that effect furnished to the contracting officer.

41. *Patent Rights.*—The contractor will hold and save the United States, its representatives, and all other persons acting for it as agent, contractor, or otherwise, harmless from all demands or liabilities for alleged use of any patented or unpatented invention, secret process, or suggestion in, or in the making or supplying of the articles of work herein contracted for, and for alleged use of any patented invention in using such articles or work for the purpose for which they are made or supplied, and if and when required, will discharge and secure the United States from all demand or liability on account thereof by proper release from the patentees or claimants, but if such release is not practicable, then by bond or otherwise, and to the satisfaction of the Chief of Engineers.

42. *Sanitation.*—The sanitary precautions, including the care of employees, shall at all times be satisfactory to the contracting officer and to the District of Columbia Health Departments. The contractor shall fully and promptly comply with all orders and regulations emanating from these sources.

The necessary sanitary conveniences for use of all laborers on the work, properly obscured from public observation, shall be constructed and maintained by the contractor in such manner and at such points as shall be approved by the contracting officer and their use shall be strictly enforced. The collection in the same shall be removed and disposed of to the satisfaction of the contracting officer.

The contractor shall obey and enforce such other sanitary regulations and orders and shall take such precautions against infectious diseases as the contracting officer may deem necessary. In case any infectious disease occurs among the employees he shall arrange for the immediate removal of the patient from the work and for his isolation from all parties connected with the work. The contractor shall keep and maintain in good condition at convenient points all articles necessary for giving first aid to the injured.

[fol. 40] Garbage, both liquid and solid, shall be promptly and satisfactorily placed in approved covered receptacles

of sufficient capacity for about one day's ordinary production, and at least once in every 24 hours all such garbage shall be incinerated or otherwise quickly disposed of to the satisfaction of the contracting officer.

All tin cans, bottles and materials of similar nature shall be periodically removed from the work and in no case thrown about or disposed of on the grounds.

43. *Emergencies.*—It is possible that emergencies may arise during the progress of the work which may require special treatment or make advisable extra shifts of men to continue the work for 16 or even 24 hours per day. These emergencies may be caused by damage to the nearby existing structures or by accidents or leakage. The contractor shall be prepared in case such emergencies arise to make all necessary repairs and shall promptly execute such work when required by the contracting officer.

44. *Care and Protection of Work.*—The contractor shall place sufficient lights on or near the work, and shall erect such rails, fences or other protections as may be necessary for the public safety.

The contractor shall be solely responsible for the care of the work covered by the contract and for the material delivered at the site intended to be used in the work. He shall provide suitable means of protection for all material intended to be used in the work, and for all work in progress as well as for completed work.

45. *Removal of Water.*—The contractor shall provide all necessary pumps, pipes, drains, ditches and other means for satisfactorily removing water from excavations or other parts of the work, or for preventing the slopes of excavations from sliding or caving. He shall provide additional pumps or drains in any place where the contracting officer shall deem them to be necessary.

No direct payment will be made for the above work which is considered as having been included in the price stipulated for excavations.

[fol. 41] 46. *Contractor To Repair Damages.*—In case any direct or indirect damage or injury is done to any public property including any completed or partly completed structures erected or being erected under this contract by or because of the work or in consequence of any act or

omission on the part of the contractor or his employees, he shall, at his own expense, restore such property to a condition equal to that existing before such damage or injury was done by repairing, rebuilding or otherwise, as may be required by the contracting officer. In case of failure on the part of the contractor to promptly restore such property or make good such damage or injury the contracting officer may upon 48 hours written notice, proceed to repair, rebuild or otherwise restore such property as may be necessary, and the cost thereof will be deducted from the amount due or to become due the contractor.

47. *Restoration of Site.*—The work under these specifications shall not be considered complete until after final inspection has been made and the contractor shall have removed all of his plant from the site and from the property of the United States; restored the hauling roads other than the present roads to the original condition of the ground; cleared from the site all debris resulting from his operations, and placed the property in a clean and sightly condition and satisfactory to the contracting officer.

48. *Measurements.*—The quantities to be paid for will be determined by measurements made on the ground by the representatives of the contracting officer, of the finished work according to the lines shown on the drawing or called for by the specifications and by computations therefrom, and the actual quantities so determined will be used as a basis for payment.

49. *Prices.*—The prices stated in the proposal will be paid and shall be accepted as full compensation for furnishing all materials and for doing all the work contemplated and specified in the contract, as well as for all loss or damage arising from the action of the elements or from unforeseen conditions or difficulties which may arise in the prosecution of the work.

[fol. 42] The above mentioned prices shall cover the cost and furnishing by the contractor of all plant, tools, labor and materials of every kind which are furnished or needed to complete the entire work, for making all needed repairs to the work and for maintaining it in a satisfactory condition until the final payment is made. Such prices shall also cover all royalties for patents and patented materials, appliances and processes used in the work.

## Materials

50. *Cement*.—All cement used on the work shall be true Portland cement of well known brands which have been in successful use for large engineering works in America for at least 5 years. It shall conform to the requirements stated in the United States Bureau of Standards Circular No. 33, effective January 1, 1921. It shall be delivered on the site of the work in the original undamaged packages with the brand and name of the manufacturer plainly marked thereon.

If the cement is delivered in bags, each bag shall contain 94 pounds net, and if in barrels, each barrel shall contain 376 pounds net. The cement shall be stored in suitable buildings which are protected from dampness and in such a manner as to permit of easy access for the proper inspection and identification of each shipment.

The cement used in the work shall either be taken from sealed bins which have passed the 28-day test by the Bureau of Standards and shipped in cars sealed by the Bureau of Standards, or 28-day tests will be made on the work by the Bureau of Standards and reports on the tests furnished to the contracting officer.

In the former case only sufficient storage at the work will be required to guarantee continuous operations. In the latter case the amount of storage must be increased sufficiently to provide for the 28-day test on the work. The contractor shall also provide and keep on hand in each storehouse suitable accurate platform scales for weighing the cement.

Immediately upon the arrival of each new shipment of cement, the contractor shall notify the contracting officer the [fol. 43] amount of cement received. No cement shall be used on the work until after it has been inspected and permission has been given by the contracting officer for its use.

51. *Fine Aggregate*.—All sand used for concrete in all parts of the work shall be siliceous sand of the best quality, clean, hard, strong, durable and uniformly graded from fine to coarse. The sand shall be free from lumps of clay, oily and greasy materials, vegetable loam and organic matter, and shall not contain over 5 per centum of clay or other foreign material and practically no particles greater than one quarter inch in diameter; not more than 30 per centum



by weight shall pass a sieve having 50 meshes per linear inch.

52. *Coarse Aggregate.*—Coarse aggregate for concrete shall consist of either gravel or crushed stone having clean, hard, strong, durable, uncoated particles free from soft, friable, thin, elongated or laminated pieces, alkali, organic, or other deleterious matter.

The coarse aggregate shall be well graded and range in size from fine to coarse within the limits of between  $1\frac{1}{2}$  inches and one-quarter inch in diameter.

53. *Water.*—The water for concrete shall be clean and free from oil, acid, alkali, organic matter and other deleterious substances and shall be furnished by and at the expense of the contractor.

54. *Steel for Reinforcement.*—The steel used for reinforcement in concrete shall be of a quality and character meeting the requirements either of the "Standard Specifications for Billet-Steel Concrete Reinforcement Bars" (Serial Designation: A 15-14) or the "Standard Specifications for Rail-Steel Concrete Reinforcement Bars" (Serial Designation: A 16-14) of the American Society for Testing Materials, except that the provision for machining deformed bars before testing shall be eliminated.

The bars shall be either square twisted or deformed, of approved types. Their areas, when determined by the [fol. 44] minimum cross-section, shall conform to the areas and equivalent sizes given in the following table:

Size of Bar in Inches	Area in Square Inches	
	Round	Square
$\frac{3}{8}$	0.110	0.141
$\frac{1}{2}$	0.196	0.250
$\frac{5}{8}$	0.307	0.391
$\frac{3}{4}$	0.442	0.563
$\frac{7}{8}$	0.601	0.766
1	0.785	1.000
$1\frac{1}{8}$	0.994	1.266
$1\frac{1}{4}$	1.227	1.563

The bars shall be free from scales, grease, paint or other objectionable coatings when placed in the work. A thin coat of red rust resulting from short exposure will not be considered objectionable, but any bars having rust scale or a

thick coat of rust shall be carefully cleaned before they are used.

The steel used for the expansion plates shall be made in accordance with the latest Standard Specifications of the American Society for Testing Materials for boiler flange steel.

55. *Timber and Lumber.*—All timber and lumber used for forms timbering tunnel and temporary work shall be of good quality and of a kind and size which is suitable for the class of work in which it is used.

56. *Miscellaneous Materials.*—All miscellaneous materials which may be required in comparatively small quantities and which are not specified herein shall be the best of their respective kind and shall be entirely suitable and satisfactory to the contracting officer in all respects.

57. *Inspection of Material.*—All materials used by the contractor on the work shall be readily accessible for inspection at all times. The contractor shall, when required, make arrangements whereby certificate of inspection of steel and other materials shall be obtained by him and delivered to the contracting officer as soon as practicable and [fol. 45] before shipment of such materials has been made. The contracting officer will, however, make such inspections and tests of all materials as he may deem necessary and no materials shall be used in the work until after they have been accepted.

#### Items Nos. 1 and 2

58. *Excavation in Tunnel and End Structures.*—The excavation under this section includes all the work of this class necessary in the tunnel and for the end structures as shown on the drawings. The excavation in the tunnel shall be made within the prescribed limits as shown on the drawing and as described in these specifications. The contractor shall make all excavation in the tunnel in accordance with reference lines "A," "B" and "C" as shown on the drawing and described in paragraph number 33, but with the understanding that no excavation removed beyond the "B" line will be paid for. Where necessary to protect existing structures in the removal of rock or other material, the contractor shall take proper precautions to avoid damage thereto. Where it is necessary to support the excavation in the tunnel and when required

by the contracting officer, the contractor shall do all timbering necessary to protect the excavation until after the concrete masonry lining has been placed, but so far as practicable the timbering and lagging in the tunnel shall be removed before the placing of the concrete lining. All timber placed in the tunnel shall be of good sound quality and of a kind and size suitable for the work. Timbering shall be done in a workmanlike manner and so as to best fulfill the requirements of the particular work in which it is used. The contractor will be allowed considerable latitude in the method of timbering, but it must be of ample strength to be entirely safe and also such as to meet the approval of the contracting officer. The contractor will not be relieved, however, of entire responsibility for any damage or accident caused by failure of the timbering in any case.

The price bid for excavation in the tunnel shall cover the cost of all necessary blasting, barring and mucking of material encountered, bailing, draining and pumping of water which may leak into excavation, and the disposition of all excavated material as may be directed. Material removed [fol. 46] and suitable for use as crushed stone or packing may be so used by the contractor. The actual amount of material excavated within the "B" line will be paid for by the cubic yard at the price bid by the contractor, which shall include the entire cost for excavating and all other items mentioned above.

The material and labor for timbering in the tunnel will be furnished by the contractor and paid for as such in place for the amount actually used in feet board measure, at the price bid by the contractor.

Such timbering as may be removed from the tunnel will be considered the property of the contractor and may be again used and paid for in case it is entirely suitable for such use. All spikes, bolts and other fastenings and all materials and labor incidental to the work of timbering in the tunnel and its removal therefrom will be included in the price paid for such work as stated above.

The timber or lumber used for setting up the plant, construction of forms, loading platforms or temporary buildings or structures will not be construed as a part of the item for timbering tunnel and will be furnished at the expense of the contractor.

## Item No. 3

59. *Concrete Masonry.*—All concrete masonry used in the tunnel lining and the various other structures shall consist of Portland cement, sand and gravel or crushed stone, mixed in the proportions of one part by volume of Portland cement, 2 parts of sand and 4 parts of either gravel or crushed stone. The measurement of the fine and coarse aggregates shall be by loose volume. The unit of measurement of the cement if furnished in bags, shall be a bag of cement containing 94 pounds net which shall be considered the equivalent of one cubic foot.

Separate storage shall be provided for each kind of aggregate. Measurement of each of the ingredients, including water, shall be made separately in an approved, accurate and uniform manner.

[fol. 47] The concrete batch or charge shall be of such size that it will not be necessary to use fractions of bags of cement to obtain the required mix.

The mixing shall be done in approved batch machine mixers of the type which will insure the uniform distribution of the materials throughout the mass and the mixing shall continue for a minimum time of  $1\frac{1}{4}$  minutes after all the ingredients are assembled in the mixture or until the concrete is mixed to the entire satisfaction of the contracting officer. The amount of water used in mixing concrete shall be only sufficient to produce the consistency required for manipulation and in no case will free water be permitted in the forms. Concrete shall not be remixed with water after it is partly set and it shall not be used after the initial set has taken place. Immediately after mixing the concrete shall be rapidly transported and placed in the work, care being taken not to allow stratification in the mixture. No concrete shall be placed in freezing weather without the approval of the contracting officer.

The concrete shall be thoroughly tamped, spaded and worked into the forms, forming a solid homogeneous masonry. Special care shall be taken to ram the concrete into all the spaces between the uneven interstices of the rock and all spaces between the forms. The invert of the tunnel lining shall be placed in alternate sections about 15 feet in length and be tamped, screeded and trowelled accurately to the required lines and grades shown on the drawings. The walls and arches of the above shall be built

in monolithic sections of such length as can easily be placed in one working day. Each of the above monolithic sections shall be built with vertical ends by means of vertical bulkheads placed in the forms.

Suitable approved keyways shall be provided in joints and special care shall be taken to remove all laitance from the surface before placing fresh concrete on older concrete. Laitance should preferably be removed while concrete is in plastic condition. From the older surface it shall be removed by picking and chipping. After cleaning all concrete surfaces and immediately before placing any concrete the entire surface to be covered shall be slushed [fol. 48] with a plastic layer of cement mortar one-half inch thick, composed of one part of cement and 2 parts of sand.

The space inside the forms shall be thoroughly cleaned of shavings, sawdust or other material immediately before placing the concrete. Any blocks of wood or other materials used as spacers shall be removed from the forms as soon as the concrete reaches the level of the spacers.

60. *Forms for Concrete Masonry.*—The contractor shall provide all necessary molds, forms and centers for supporting and shaping the concrete. All forms shall be water tight, true to line and so put together as to present a satisfactory smooth surface with no indentation or warping. They shall be so strongly built and put together and braced as to withstand all the operations incidental to the placing of concrete without being deformed or displaced, and they shall stand without movement until the concrete is set. To obtain tightness, calking with oakum or other suitable material may be required, and the contractor shall provide the necessary materials for and do all necessary calking before placing the concrete.

The forms shall be thoroughly coated with oil or some other approved substance to prevent the concrete adhering to them. No oil or other substance shall be used that will discolor the exposed faces of the concrete. If the contractor elects to use steel forms the surface of all such forms against which the concrete is placed shall have all rivet heads counter sunk and finished smooth and flush with the surface. Otherwise such forms shall conform to the general requirements specified herein for forms. The forms shall be maintained at all times in good condition as to accuracy



and shape, strength, rigidity, water-tightness and smoothness of surface and shall be oiled as frequently as may be required to secure a proper surface on the concrete. Forms unsatisfactory in any respect shall not be used, and if condemned shall be removed immediately from the work or destroyed.

The contractor shall furnish a sufficient number of forms to insure the proper construction of the various structures and to maintain the proper rate of progress. No forms shall be removed without the permission of the contracting [fol. 49] officer or his representative. When the forms are removed no patching shall be done on the concrete surfaces until after they have been inspected. Where wires are used to hold the forms together, they shall, upon the removal of the forms, be cut off beneath the surface of the concrete, the ends carefully driven in with a punch and the holes pointed with one to two mortar before the concrete has fully set.

61. *Placing Concrete.*—Immediately before placing concrete the forms shall be thoroughly wetted. The concrete should be placed as near the point of final deposit as possible and shall be compacted in the forms and around the steel reinforcement in the most thorough manner possible by tamping and working the steel shovel or slicing tool up and down until the ingredients have settled to their proper places. Special care shall be taken to work the stone back from the forms in order to make the exposed surface of the finished work smooth and free from voids.

At the time of placing particular care should be taken to prevent any leakage of water from the concrete, and the contractor shall keep on the work ready for instant use a sufficient quantity of plastic clay, oakum or other material suitable for the purpose and shall promptly stop all leakage from the forms, or leakage that may occur between the forms and concrete previously placed.

The exposed surfaces of the tunnel inverts and other structures shall be tamped, screeded and trowelled to smooth surfaces and true to lines and grades.

Defective concrete shall be entirely cut out and removed to the extent directed, and replaced with new concrete as soon as practicable. Every precaution shall be taken to prevent the concrete from drying until there is no danger

of cracking from lack of moisture. The concrete shall be kept moist for at least one week.

The quantity of concrete masonry to be paid for shall be the number of cubic yards actually deposited within the lines and grades given in accordance with the drawings, specifications or requirements, deductions being made for all openings.

[fol. 50] The price paid per cubic yard for concrete under the various items shall include the furnishing and placing of concrete, forms, tie-rods, wires and spacers, the calking and making water tight of all joints in the forms, the troweling and finishing of all required surfaces, pumping, and all other items necessary to complete the work.

#### Items Nos. 4 and 5

62. *Dry Packing and Grouting in Tunnel.*—No dry packing will be allowed except where necessary over the crown of the tunnel arch, in which case clean sound stones shall be used for packing and the spaces between such packing shall be thoroughly filled with grout, pumped into place, consisting of one part of Portland cement and 2 parts of fine building sand mixed with a suitable amount of water.

Dry packing will be paid for by the cubic yard at the price bid by the contractor, the actual amount being determined by measuring the spaces so filled.

Grouting will be paid for by the number of bags of cement used in the grout, pumped into place and at the price bid by the contractor.

#### Item No. 6

63. *Back Filling.*—After the masonry structures for the headings and inlet and outlet of the tunnel have been completed, or when required by the contracting officer, the spaces around these structures shall be filled to the lines and grades shown on the drawings or required by the contracting officer. Before placing any back filling, all rubbish and unsuitable materials shall be removed from the space and disposed of as the contracting officer may direct. The material used for back filling shall be suitable earth containing sufficient clay to insure water tightness. The materials shall be compacted by puddling, tamping or some other satisfactory method.

The back filling will be paid for by the cubic yard at the unit price bid by the contractor for the actual amount placed

which will be determined by measurements taken of the space to be filled.

[fol. 51]

#### Item No. 7

64. *Steel Reinforcement.*—The contractor shall furnish and place all steel bars and bonding wire of whatever size, shape and length required for the reinforcement of the concrete.

All steel reinforcement shall be placed accurately in the positions shown on the drawings or as directed by the contracting officer, and shall be so fastened in position as to prevent displacement while the concrete is being deposited. The bars shall be wired together at intersections. The wire used shall be annealed of not less than No. 18, Brown and Sharpe gauge or equal thereto. All bars shall be thoroughly cleaned of all dirt or grease.

If it becomes necessary to allow any steel that has been partially embedded in the concrete to remain exposed for any length of time, the rods shall be protected against bending or injury during the time of construction, and should they become rusted they shall be thoroughly and satisfactorily cleaned before placing of new concrete.

The weight of steel reinforcement to be paid for shall be that actually placed within the forms in accordance with plans or instructions, and it shall be computed in pounds per foot for the length and cross-sections specified or ordered. The weights of tie wires and other supports will not be included. No allowance will be made for waste, but necessary laps shown on the plans or authorized by the contracting officer will be paid for.

Payments will be made for steel reinforcement at the price bid per pound under Item No. 7. The work shall include the furnishing and placing of the rods, the bending, lapping, cleaning, wiring, supporting in position, and all labor, tools, materials and appurtenances necessary to complete the work.

#### Item No. 8

65. *Steel Expansion Plates.*—Under Item No. 8, the contractor shall furnish and place all expansion plates required [fol. 52] in the execution of this contract. They shall be placed at points indicated on the drawing or as directed by the contracting officer.

The expansion plates shall be one-quarter inch in thickness and 12 inches wide; they shall be of the length and bent to the shapes indicated. Where steel plates abut one another or it becomes necessary to make a splice, they shall be welded or riveted and the joints made water-tight. Should any riveting be done there shall be at least 6 one-half inch rivets in each joint and the plates shall lap at least 4 inches. The rivets shall be countersunk and made smooth and flush with the plate on both sides.

All expansion plates shall be painted with one coat of red lead and oil paint immediately after delivery to protect them from rust.

Expansion plates shall be rigidly supported, braced and held in position, and maintained free from injury until they are finally embedded in the concrete.

The quantity of expansion plates to be paid for shall be the number of pounds actually placed in the work in accordance with the drawings or requirements.

Payment for expansion plates will be made at the unit price per pound bid under Item No. 8, which shall include all labor, tools, materials and appurtenances necessary to complete the work.

#### Item No. 9

66. *Miscellaneous Steel Work.*—Under Item No. 9, the contractor shall furnish and place all ladders and miscellaneous steel work, other than the reinforcing bars and expansion plates, that may be shown on the drawings, or required by the contracting officer, as necessary for the satisfactory completion of the work.

All exposed metal work shall be carefully cleaned and shall then be given one coat of red lead or other approved paint.

[fol. 53] The quantity of steel work paid for shall be the number of pounds actually placed in the work in accordance with the drawings and requirements.

Payment for miscellaneous steel work will be made at the unit price bid under Item No. 9.

#### Item No. 10

67. *Special Castings.*—All special castings shown on the drawings or required by the contracting officer shall be furnished and set in place by the contractor.

The special castings shall be made in conformance with the "Standard Specifications for Cast Iron Water Pipe and Special Castings" of the American Water Works Association adopted May 12, 1908, and amendments thereto if any, and with the drawings.

All castings to be placed in concrete shall be set to the exact lines and levels established by the contracting officer, and shall be securely fastened in the forms in such a way as to prevent movement during the placing of concrete, or to prevent the leakage of water from the concrete. All castings shall be clean when set, and shall be kept so during the progress of the work. The manhole castings shall be set accurately to the lines and grades shown on the drawings or required by the contracting officer and their bases shall be embedded in a layer of neat Portland cement mortar spread on the upper surface of the concrete immediately before the manhole castings are put in place.

The weight to be paid for under Item No. 10 shall be the number of short tons (2,000 pounds) as marked on the castings or given by the manufacturer.

Payment will be made for work under the above items at the unit prices bid by the contractor.

68. *Proposal and Contract.*—The proposal form has an entry for each item on which estimates will be given or payments made, and no other allowances of any kind will be [fol. 54] made unless specifically provided for in the specifications or the contract, or supplemental contracts.

Bids will be received for the entire work only, and each blank must be filled.

The quantities of each item of the proposal, as finally ascertained at the close of the contract, in the units given and the unit prices of the several items stated by the bidder in the accepted bid, will determine the total payments to accrue under the contract. The unit price bid for each item must allow for all collateral or indirect cost connected with it.

United States Engineer Office, 250 Old Land Office Building, Washington, D. C., October 6, 1924.



[fols. 55-56] III. GENERAL TRAVERSE—Filed August 15, 1942

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Francis M. Shea, Assistant Attorney General.

#### IV. ARGUMENT AND SUBMISSION OF CASE

On December 8, 1943, the case was argued and submitted on merits by Mr. Herman J. Galloway, and Mr. George R. Shields, for plaintiff, and by Assistant Attorney General Francis M. Shea for the defendant.

[fol. 57] V. **Opinion of the Court by Madden, J. and Dissenting Opinion by Littleton, J.**—Filed January 3, 1944

*Mr. Herman J. Galloway and Mr. George R. Shields* for the plaintiff.

*Mr. Assistant Attorney General Francis M. Shea* for the defendant. *Mr. Philip Meehem* was on the brief.

#### OPINION

MADDEN, *Judge*, delivered the opinion of the court:

This suit is here by virtue of a special act of Congress, the text of which is quoted later in this opinion. The facts preceding the enactment of the special act were as follows:

The plaintiff made a contract with the Government dated December 3, 1924, to construct a tunnel for the supply of water for the District of Columbia. The work was completed in 1927. The plaintiff claimed that the Government had in various ways breached the contract and he brought a suit (K-366) in this court, asking for damages in the sum of \$306,825.33. The case was tried and the court rendered a judgment for the plaintiff for \$45,174.46, accompanied by an opinion which dealt with the issues in the case (76 C. Cls. 64). The plaintiff made several motions for new trials, which were denied. Written opinions accompanied two of the denials (81 C. Cls. 658; 86 C. Cls. 18). The plain-

tiff petitioned the Supreme Court of the United States for a writ of certiorari to review this court's decision. The Supreme Court denied the petition (303 U. S. 654). All of the foregoing steps in the litigation were taken under the general legislation conferring jurisdiction on this court, [fol. 58] subject to review by the Supreme Court (28 U. S. C. §§ 250, 288). The amount of the judgment rendered by this court in favor of the plaintiff was paid to him.

In 1942 the plaintiff secured the passage of the special act of Congress under which this suit is brought. The text of the act is as follows:

#### AN ACT

To confer jurisdiction upon the Court of Claims to hear, determine, and render judgment upon the claims of Allen Pope, his heirs or personal representatives, against the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That jurisdiction be, and the same is hereby, conferred upon the Court of Claims of the United States, notwithstanding any prior determination, any statute of limitations, release, or prior acceptance of partial allowance, to hear, determine, and render judgment upon the claims of Allen Pope, his heirs, or personal representatives, against the United States, as described and in the manner set out in section 2 hereof, which claims arise out of the construction by him of a tunnel for the second high service of the water supply in the District of Columbia.

Sec. 2. The Court of Claims is hereby directed to determine and render judgment at contract rates upon the claims of the said Allen Pope, his heirs or personal representatives, for certain work performed for which he has not been paid, but of which the Government has received the use and benefit; namely, for the excavation and concrete work found by the court to have been performed by the said Pope in complying with certain orders of the contracting officer, whereby the plans for the work were so changed as to lower the upper "B" or "pay" line three inches, and as to omit the timber lagging from the side walls of the tunnel; and for the work of excavating materials which caved in over the

tunnel arch and for filling such caved-in spaces with dry packing and grout, as directed by the contracting officer, the amount of dry packing to be determined by the liquid method as described by the court and based on the volume of grout actually used, and the amount of grout to be as determined by the court's previous findings based on the number of bags of cement used in the grout actually pumped into the dry packing.

Sec. 3. Any suit brought under the provisions of this Act shall be instituted within one year from the date [fol. 59] of the approval hereof, and the court shall consider as evidence in such suit any or all evidence heretofore taken by either party in the case of Allen Pope against the United States, numbered K-366, in the Court of Claims, together with any additional evidence which may be taken.

Sec. 4. From any decision or judgment rendered in any suit presented under the authority of this Act, a writ of certiorari to the Supreme Court of the United States may be applied for by either party thereto, as is provided by law in other cases.

Approved, February 27, 1942.

It is apparent that the suit which is now before us has already been litigated to a final judgment in this court, under the court's general jurisdiction, and the right to seek a review of the judgment in the Supreme Court, which is also granted by a statute of general application, has already been exercised and the review denied. The plaintiff seeks to justify his attempt to obtain a second and more favorable judgment from a court which has already heard, determined, and rendered final judgment in the same litigation, by pointing to the special act.

The history recited above presents a problem as to the power of Congress, under the Constitution, to do what the special act attempts to do. The text of the special act is quoted above. A rereading of Section 2 of the act will show that the task which the court is directed to perform is a small and unimportant one. It is directed to refer to its previous findings, take certain cubic measurements and certain numbers of bags of cement which are recited there by reference, multiply those figures by the several unit prices stipulated in the contract for the several kinds of work, add

the results, and render judgment for the plaintiff for the sum. If this reading of Section 2 is correct, not only does the special act purport to confer upon the plaintiff the unusual privilege of litigating the same case a second time in a court which once finally decided it, and applying a second time for a review in the Supreme Court of the United States, which once considered and denied such a review. The special act also purports to decide the questions of law which were in the case upon its former trial and would, but for the act, be in it now, and to decide all questions of fact except certain simple computations. Thus a second serious question [fol. 60] as to the Constitutional power of Congress is presented.

The Government urges that we avoid the constitutional issue by construing the act to mean only that a new trial is granted to the plaintiff by the act, in which new trial the court will be free to decide, in the usual manner of a court, the questions of law and fact involved in the case. Counsel for the plaintiff, though in their original brief they said, as to one item of the claim "The Act appears mandatory that such cost be now allowed," and expressed, though less peremptorily, a similar view as to other items, seemed to take the position at the oral argument and in their final brief that the court could, under the act, exercise a considerable power of decision if it would take jurisdiction of the case.

While we recognize that a court should make every proper effort to give to a statute a construction which keeps it clear of serious constitutional questions, we are unable to so construe the special act. We think that the language of Section 2 is plain, and is, as the plaintiff originally contended, mandatory as to how the case must be decided if the court undertakes the jurisdiction which the act purports to confer. We are not willing to distort the plain meaning of language, for the purpose of evading a troublesome question. We therefore undertake the question as to whether Congress can effectively direct this court to again decide this case, which it has once finally decided under its general jurisdiction, and to decide it for the plaintiff, and give him a judgment for an amount which simple computation based upon data referred to in the special act, will produce.

We refer first to *United States v. Klein*, 13 Wall. 128. Under a general statute of 1863 and Presidential proclamations issued pursuant thereto, Klein, by virtue of his oath of allegiance and a resulting Presidential pardon, was entitled



to sue in this court for property captured by the Union Army during the Civil War. He did so sue and recovered a judgment. The Government appealed the case to the Supreme Court. While the appeal was pending, Congress in 1870 passed an act providing that no pardon should be admissible to establish any claim against the United States, and that when any pardon had been granted to a person suing under the act of 1863, which pardon recited that the recipient "took part in the late rebellion" and which pardon [fol. 61] had been accepted in writing without express disclaimer, by the recipient, of guilt, the pardon should be conclusive evidence "that such person did take part in . . . the late rebellion" and upon proof of the pardon and the acceptance of it the jurisdiction of the court should cease and the court should forthwith dismiss the suit.

The Government urged that the Supreme Court should dismiss the suit. Instead, that court affirmed the judgment of this court and held the 1870 Statute unconstitutional. The opinion, delivered by Chief Justice Chase, said:

It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress. The court has jurisdiction of the cause to a given point; but when it ascertains that a certain state of things exists, its jurisdiction is to cease and it is required to dismiss the cause for want of jurisdiction.

It seems to us that this is not an exercise of the acknowledged power of Congress to make exceptions and prescribe regulations to the appellate power.

The court is required to ascertain the existence of certain facts and thereupon to declare that its jurisdiction on appeal has ceased, by dismissing the bill. What is this but to prescribe a rule for the decision of a cause in a particular way? In the case before us, the Court of Claims has rendered judgment for the claimant and an appeal has been taken to this court. We are directed to dismiss the appeal, if we find that the judgment must be affirmed, because of a pardon granted to the intestate of the claimants. Can we do so without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the



Judicial Department of the government in cases pending before it?

We think not; \* \* \*

The Chief Justice also said:

We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power.

It is of vital importance that these powers be kept distinct. The constitution provides that the judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress [fol. 62] shall from time to time ordain and establish. The same instrument, in the last clause of the same article, provides that in all cases other than those of original jurisdiction, "the Supreme Court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

Congress has already provided that the Supreme Court shall have jurisdiction of the judgments of the Court of Claims on appeal. Can it prescribe a rule in conformity with which the court must deny to itself the jurisdiction thus conferred, because and only because its decision, in accordance with settled law, must be adverse to the government and favorable to the suitor? This question seems to us to answer itself.

We think that the Supreme Court's decision in the *Klein* case is applicable to and decisive of the question before us. The fact that in the *Klein* case the statute attempted to take away a right of recovery from the person who was suing the Government, while in our case the statute attempts to confer a right of recovery upon such a person, must be immaterial. The ground of decision in the *Klein* case was the attempted encroachment, by one of the three independent branches of the Government, upon another; the effort of Congress to decide a law suit while it was pending in a court. The fact that in the *Klein* case the statute was enacted while the case was still pending on appeal in the Supreme Court, while in the instant case the statute was enacted some years after the case had been finally adjudicated, cannot be a basis of distinguishing the cases. Everything which the Supreme Court said in the *Klein* case, in which the suit was a pend-

ing one, could be applied with even greater emphasis to a legislative direction to a court which has already heard and decided a case, to hear it again and decide it differently.

While counsel for the plaintiff have not seriously urged that the doctrine laid down in the case of *Williams v. United States*, 289 U. S. 553, has any important bearing upon the question here presented, we nevertheless give brief attention to that question. In that case the Supreme Court held that this court was a legislative court, not created under the provisions of Article III of the Constitution of the United States, and that therefore the salaries of its judges could be reduced during their tenures of office. The Supreme Court said (p. 561):

[fol. 63] It is a court of great importance, dealing with claims against the United States, which, in the aggregate, amount to a vast sum every year. The questions which it considers call for the exercise of a high order of intelligence, learning and ability. The preservation of its independence is a matter of public concern. The sole function of the court being to decide between the government and private suitors, a condition, on the part of the judges, of entire dependence upon the legislative pleasure for the tenure of their offices and for a continuance of adequate compensation during their service in office, to say the least, is not desirable.

But these considerations, though obvious enough, are not sufficient, standing alone, to support a conclusion that the Court of Claims comes within the reach of the judicial article in respect of tenure of office and compensation. The integrity of such a conclusion must rest not upon its desirability, but upon its conformity with the provisions of the Constitution.

We do not attempt to explain the decision in the *Williams* case, because, and we say it with deference, we do not pretend to understand it.<sup>1</sup> In any event, the language of the Supreme Court in the *Williams* case, and the fact that that language was uttered in the course of the decision

<sup>1</sup> Compare *U. S. v. Klein*, 13 Wall 128, 144-145; *U. S. v. Union Pacific R. R.*, 98 U. S. 569, 603; *Miles v. Graham*, 268 U. S. 501. But see *Ex parte Bakelite Corporation*, 279 U. S. 438.

of a case certified to the Supreme Court by this court, would seem to leave no room for doubt that this court is a court, in fact as well as in name, and that its decisions are judicial decisions. If it were not, the Supreme Court would not review its decisions,<sup>2</sup> as it does, and has done since the amendment, in 1866, 14 Stat. 9, of the statute defining the jurisdiction and powers of this court. *United States v. Jones*, 119 U. S. 477. And we would suppose, unless the decision in the *Williams* case means the contrary, that we are no more acting as a mere agent or arm of the legislature, when we decide our cases in the first instance, than is the Supreme Court, when it, under the appellate procedure prescribed in the statute,<sup>3</sup> decides them finally. Each court is assigned its place in the process of doing [fol. 64] justice between the United States and those who have claims against it. That is the major portion of this court's assignment. It is only a small part of the Supreme Court's assignment. But one, when it is performing that assignment must be acting judicially, if the other is.

The special act here in question provides, in Section 4, that from this court's decision, a writ of certiorari may be applied for in the Supreme Court, as in other cases. But if the Congressional mandate of Section 2, which directs this court how to decide the case, is valid, and is followed by this court, it would equally, it would seem, be binding upon the Supreme Court. There would be little chance of error, since only mathematical computation is left to the court, hence, the provision for certiorari in Section 4 is perhaps not important.

Perhaps we have discussed the question presented by this case as if it were a dry question of constitutional theory. It is not. It is a question of whether this court, which has for some eighty years been entrusted with the responsible and dignified function of doing justice between the United States and those who bring suit against it, is going to be permitted to perform that function with the independence and single-mindedness to justice which the task deserves. It is a question of whether the judges

<sup>2</sup> *Hayburn's Case*, 2 Dall. 409; *Gordon v. U. S.*, 117 U. S. 697 (see the opinion of Chief Justice Taney in *Gordon's* case, printed in 117 U. S. 697); *B. and O. R. R. v. Interstate Commerce Commission*, 215 U. S. 216.

<sup>3</sup> 43 Stat. 939, 28 U. S. C. § 288.

of this court may continue to decide their cases as their consciences, and such acumen as they have, may lead them to decide, with the confidence that their decisions will be reviewed in the traditional judicial way, with both sides of the controversy presented to the reviewing tribunal; or must, on the other hand, feel that they must weigh in the scales the ability, energy, and persistence of the parties to the suit and their counsel, since they may, in a naturally completely partisan effort, obtain a hearing before a committee of Congress, at which hearing the other side of the controversy is not presented, and secure legislation setting aside the judgment of the court and directing the court to put its indorsement upon the judgment of members of another branch of the Government.

This court is, of course, as prone to error as any other. Its decisions are, as are those of other courts, sometimes erroneous, and sometimes unjust. A litigant in any court is subject to such a hazard. But the unusual procedure followed in this case is still more hazardous, as may be shown by considering just one of the items of plaintiff's claim. Item 2 of his claim, as summarized in paragraph VI of his petition is for

- |                                                |             |
|------------------------------------------------|-------------|
| 2. Excavation of materials which caved in over |             |
| the tunnel arch, 4,781 cubic yards at          |             |
| \$17.00                                        | \$81,277.00 |

By section 2 of the special act, this court is, in effect, directed to render a judgment for that amount. Yet we venture to say that no court, left free to decide the question according to law and justice would decide that the plaintiff should recover one dollar upon that claim. The relevant facts are that, in the process of excavating the tunnel, large amounts of earth and rocks caved in from the roof of the tunnel. These cave-ins occurred through no effort of the plaintiff, and, he claims, in spite of his efforts to prevent them. On the former trial of the case in this court, the plaintiff himself testified that:

The specifications described the B line as being the outside limiting line for which payment for excavation will be made. If any excavation is made outside that line, either by mistake or by the ground caving in, no payment is made beyond that line. That line is the limiting line for pay.

He further testified that the Government's contracting officer had said he "hoped to find some other method of filling that space over the rock section that would be less expensive than filling it with dry pack and grout" but that plaintiff protested against this because:

The manner provided in the contract for reimbursing me for hauling out of the tunnel whatever rock or earth fell into it was covered in the compensation allowed me for dry packing and grout.

He further testified, with reference to a ruling (later rescinded) by the contracting officer that no grout should be put in the dry packing in the rock sections, that he complained to the contracting officer that such a ruling would cause him loss because, he testified,

All this preparatory work that I had done would not be paid for; that is, I was paid for no excavation that fell down above the "B" line, all this earth that fell down I was not paid for it under the item of excavation. The only way I would get paid for removing that earth [fol. 66] that fell down was when I refilled it with dry packing and grout and my price for grout included the cost of removing that earth from the tunnel.

On his cross-examination the questions and answers relating to the same matter were as follows:

625. XQ. You said in your testimony that the only way for you to get paid for the earth which you took out, the excess earth above the B line, was to grout with stones.

A. Yes, sir.

627. XQ. And you were being paid \$3 a bag for cement used in grouting and that cement cost you 80 cents, didn't it?

A. The cement alone cost that, but there were other materials. The cement was only a guide, a measure. There was the sand and there was labor, and equipment to put it in, and besides that, that was computed to pay for the cost of the earth, removing the earth that fell in.

628. XQ. Certainly; so that you expected to make enough profit out of the grouting to pay for the falling of the earth; isn't that what you said?



A. No, sir; I expected to be paid. I expected payment for the grout would pay for the earth that fell in, removing the earth.

629. XQ. It would pay?

A. Yes.

630. XQ. In other words, the grout pay would pay you for the labor of removing the excess earth; isn't that what you mean?

A. That is exactly what I have been trying to show for five years.

Plaintiff now presents to the court a congressional direction to give him, in addition to pay for all the dry packing and grouting which he claims he did, and which, as measured would fill the space left vacant by the earth and rocks that fell into the tunnel, more than \$80,000, one-half of the whole amount which the court is directed to pay him, for work for which, by his own construction of the contract, he was entitled to no pay at all, except the pay for dry packing and grouting.

We think that, in a judicial proceeding with both sides represented, a plaintiff would hardly ever recover a judgment for \$80,000 upon a claim which had no basis whatever. And we think we should not be directed to indorse that kind [fol. 67] of a judgment, arrived at by members of another branch of the Government. Each branch of the Government will, inevitably, make mistakes, but each should take, and keep, the responsibility for the mistakes it makes.

Under the decision of the Supreme Court in the *Williams* case, *supra*, the tenures and salaries of the Judges of this court are at the will of Congress. We would be much less than worthy of the trust which has been reposed in this court since the year 1863<sup>4</sup> if we should also subject our decisions to the will of Congress.

<sup>4</sup> Act of March 3, 1863; 12 Stat. 765. President Lincoln in a message to Congress on December 3, 1861, said:

"It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the Government, especially in view of their increased number by reason of the war. It is as much the duty of Government to render prompt justice against itself in favor of its citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in

In the view which we have taken of Section 2 of the special act, it is not necessary for us to decide, and we do not decide, whether an act which merely granted a new trial, without directing the court how to decide the case upon the new trial, would or would not be an infringement upon the judicial powers of the court.<sup>5</sup> In the case of *Pocono Pines Assembly Hotels Co. v. United States*, 73 C. Cls. 447, all members of the court were of the opinion that such an act would be unconstitutional if its effect was to deprive a claimant against the United States of a judgment which he had recovered, though they differed in their views as to whether the act there in question did grant a new trial. We think that an act directing the court to re-try the issues of a case, which issues were or should have been tried the first time would, regardless of whether the Government or the plaintiff sought the new trial, be no less dangerous to the independence of the court as a judicial body, than a direction to the court as to how it must decide a pending or previously adjudicated case. It likewise would require the court, when it was first deciding the case, to keep its mind, not solely on the law and the facts of the case, but also on the question of [fol. 68] how its decision would look to the members of another branch of the Government, when presented to them in partisan fashion without the safeguards which accompany judicial review.

What we have said is said with the complete respect which is properly due the legislative branch of the Government. We have no feeling that there is involved in this case any

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their nature belong to the judicial department. Besides, it is apparent that the attention of Congress will be more than usually engaged for some time to come with great national questions. It was intended by the organization of the Court of Claims mainly to remove this branch of business from the halls of Congress; but while the court has proved to be an effective and valuable means of investigation, it in great degree fails to effect the object of its creation for want of power to make its judgments final."

The act of 1863 referred to at the beginning of this note was the result of this message.

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<sup>5</sup> See *Cherokee Indians v. United States*, 270 U. S. 476, 486.

intentional effort to infringe upon the proper exercise by this court of its assigned duties in our scheme of government. The Congress has its problems, difficult and pressing. From the very nature of our work, we have opportunities for deliberate consideration of particular cases, which, as we understand, Congress has not. We desire only to be permitted to act as a court.

It follows from what we have said that the plaintiff's petition must be dismissed.

It is so ordered.

WHITAKER, *Judge*; and WHALEY, *Chief Justice*, concur.

#### DISSENTING OPINION

LITTLETON, *Judge*, dissenting: I cannot concur in the opinion of the majority dismissing the petition for lack of jurisdiction to consider it notwithstanding the Special Jurisdictional Act of February 27, 1942. I do not construe the special act as in any way infringing upon the Judicial Department of the Government or upon the proper exercise by the court of its judicial duties. On the contrary, I construe the act as an authorization by the lawmaking Departments of the Government to the court to consider plaintiff's claims in the light of the waivers by the Legislative and Executive Departments of the Government of limitations, *res adjudicata*, and certain rights and defenses of the Government, mentioned in Sections 1 and 2 of the act, which the Government, as the defendant in the suit, might otherwise bring forward and successfully insist upon in opposition to the jurisdiction of the court and the right of plaintiff to make and maintain the claims. I do not think Congress intended to go, and I do not find anything in the special jurisdictional act which goes, beyond this. Section 1 of the act is a grant of jurisdiction and authority to hear, determine, [fol. 69] and enter judgment notwithstanding certain defenses mentioned therein, including the waivers of defenses which might otherwise be made, as more specifically described in Section 2 of the act. No special significance should be attached to the word "directed" appearing in the first clause of Section 2. Section 1 conferred the jurisdiction and authority to be exercised by the court and section 2 simply described in detail the basis of the liability which the Government, acting through the Legislative and Execu-

five Departments, was willing to assume in the circumstances, and by this section 2 the Government consented to be charged on the basis specified in accordance with such findings and such measurements as the court shall make in accordance with the jurisdiction and authority conferred by section 1.

I think it is clear that Congress by an act approved by the President may do this without in any way interfering with the proper judicial function of the court although the reason of Congress in so doing is purely moral or equitable rather than legal, and, notwithstanding the plaintiff has once lost his case in this court in a suit under the contract. It seems to me that the Sovereign, which acts through its Legislative and Executive branches in respect of the institution of suits against it and through the Judicial branch in the determination and adjudication of claims against it, in such suits, is not exactly in the same situation as a private litigant might be in regard to the matter of assuming a liability, or liabilities, on a specified basis and authorizing and empowering this court to adjudicate and determine such assumed liabilities in a second suit. The provisions of the Special Act of February 27, 1942, now form the legal basis for the adjudication of the claims presented in the petition filed thereunder. *Alcock v. United States*, 74 C. Cls. 398. See, also, *Cherokee Nation v. United States*, 270 U. S. 476, 486. I do not think the case of *United States v. Klein*, 13 Wall. 428, is in point here.

[fol. 70] For the reason stated I think the court has jurisdiction and authority in the premises and should proceed to hear, determine, and enter judgment under the provisions of the jurisdictional act and upon the record in the case.

JONES, *Judge*, took no part in the decision of this case.

#### [fols. 71-72] VI. JUDGMENT OF THE COURT—January 3, 1944

At a Court of Claims held in the City of Washington on the 3rd day of January, A. D., 1944, judgment was ordered to be entered as follows:

It Is Therefore Adjudged and Ordered that the plaintiff's petition be and the same is hereby dismissed.

[fol. 73] Clerk's Certificate to foregoing transcript omitted in printing.

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Endorsed on cover: File No. 48,177—Court of Claims. Term No. 684. Allen Pope, Petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed February 10, 1944. Term No. 684, O. T. 1943.

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[Vol. 74] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 3, 1944

The petition herein for a writ of certiorari to the Court of Claims is granted. Counsel are requested to discuss in their briefs and on oral argument the question whether the present action, authorized by the Special Act of February 27, 1942 (56 Stat. 1122), is of a nature to admit of review by this Court under Article III of the Constitution.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1361)

